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In the Supreme Court of the United States

OCTOBER TERM, 1997

BETH ANN FARAGHER, PETITIONER

v.

CITY OF BOCA RATON

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

BRIEF FOR THE UNITED STATES AND THE EQUAL EMPLOYMENT OPPORTUNITY COMMISSION AS AMICI CURIAE SUPPORTING PETITIONER

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QUESTIONS PRESENTED

1. Whether the court of appeals adopted the correct legal standard for deciding when a supervisor's sexual harassment of a subordinate is aided by his agency relationship with the employer.

2. Whether the court of appeals adopted the correct legal standard for deciding when a supervisor's knowledge of sexual harassment may be imputed to the supervisor's employer.

3. Whether the court of appeals erred in failing to remand to the district court the question whether respondent's failure to disseminate its policy against sexual harassment warranted a finding that respondent should have known about the sexual harassment of petitioner.

TABLE OF CONTENTS

	Page
Interest of the United States and the Equal Employment Opportunity Commission	1
Statement	2
Summary of argument	9
Argument:	
The court of appeals applied the wrong legal standards in deciding that respondent was not liable for the hostile work environment created by its supervisors	12
A. An employer is liable for a supervisor's harassment of a subordinate when the supervisor is aided in the harassment by his agency relationship or when the employer knew or should have known about the harassment and failed to take appropriate corrective action	12
B. The court of appeals applied the wrong legal standard in finding that the harassment of petitioner was not aided by an agency relationship with respondent	17
C. The court of appeals applied the wrong legal standard for determining when a supervisor's knowledge of harassment can be imputed to an employer	25
D. The court of appeals erred in failing to remand to the district court the question whether respondent's failure to disseminate its policy against harassment warranted a finding that respondent should have known about the harassment of petitioner	28
Conclusion	30

TABLE OF AUTHORITIES

Cases: Page

Albemarle Paper Co. v. *Moody*, 422 U.S. 405 (1975) 22
Anderson v. *Methodist Evangelical Hosp., Inc.*, 464 F.2d 723 (6th Cir. 1972) 16
Andrade v. *Mayfair Management, Inc.*, 88 F.3d 258 (4th Cir. 1996) 27
Blankenship v. *Parke Care Centers, Inc.*, 123 F.3d 868 (6th Cir. 1997), petition for cert. pending, No. 97-906 16
Bouton v. *BMW of N. Am., Inc.*, 29 F.3d 103 (3d Cir. 1994) 15, 25
Community for Creative Non-Violence v. *Reid*, 490 U.S. 730 (1989) 14
Davis v. *City of Sioux City*, 115 F.3d 1365 (8th Cir. 1997) 14-15, 25
Flowers v. *Crouch-Walker Corp.*, 552 F.2d 1277 (7th Cir. 1977) 15-16
Harrison v. *Eddy Potash, Inc.*, 112 F.3d 1437 (10th Cir. 1997), petition for cert. pending, No. 97-232 ..... 17, 18, 19
Jansen v. *Packaging Corp. of Am.*, 123 F.3d 490 (7th Cir. 1997), petition for cert. pending, No. 97-569 ..... 14, 19, 28
Karibian v. *Columbia Univ.*, 14 F.3d 773 (2d Cir.), cert. denied, 512 U.S. 1213 (1994) 15, 16, 17, 18
Kauffman v. *Allied Signal, Inc.*, 970 F.2d 178 (6th Cir.), cert. denied, 506 U.S. 1041 (1992) 15
Long v. *Eastfield College*, 88 F.3d 300 (5th Cir. 1996) 15
Martin v. *Cavalier Hotel Corp.*, 48 F.3d 1343 (4th Cir. 1995) 18
McKenzie v. *Illinois Dep't of Transp.*, 92 F.3d 473 (7th Cir. 1996) 16

Cases—Continued: Page

Meritor Savings Bank, FSB v. *Vinson*, 477 U.S. 57 (1986) 9, 12, 13, 25
Nichols v. *Frank*, 42 F.3d 503 (9th Cir. 1994) 15, 25
Pullman-Standard v. *Swint*, 456 U.S. 273 (1982) ... 29
Sauers v. *Salt Lake County*, 1 F.3d 1122 (10th Cir. 1993) 15
Shager v. *Upjohn Co.*, 913 F.2d 398 (7th Cir. 1990) 15
Sparks v. *Pilot Freight Carriers, Inc.*, 830 F.2d 1554 (11th Cir. 1987) 18
Steele v. *Offshore Shipbuilding, Inc.*, 867 F.2d 1311 (11th Cir. 1989) 15
Tomka v. *Seiler Corp.*, 66 F.3d 1295 (2d Cir. 1995) 19
Torres v. *Pisano*, 116 F.3d 625 (2d Cir. 1997), cert. denied, No. 97-578 (Dec. 1, 1997) 17, 26
Young v. *Bayer Corp.*, 123 F.3d 672 (7th Cir. 1997) 26

Statutes and regulations:

Civil Rights Act of 1964, Tit. VII, 42 U.S.C. 2000e *et seq.* 1, 4
42 U.S.C. 2000e-2(a)(1) 12
42 U.S.C. 2000e-5(f)(1) 1
Civil Rights Act of 1991, Pub. L. No. 102-166, 105 Stat. 1071 22
42 U.S.C. 1981a(b) 22
29 C.F.R.:
Section 1604.11(a)(2) 13
Section 1604.11(d) 16

Miscellaneous:

137 Cong. Rec. 30,661 (1991) 23
James, *Vicarious Liability*, 28 Tul. L. Rev. 161 (1954) 22, 23

Miscellaneous—Continued: Page

Policy Guidance on Current Issues of Sexual Harassment, EEOC Compl. Man. (CCH) ¶ 3114 (Mar. 19, 1990) 20
Prosser and Keeton on the Law of Torts (W. Page Keeton ed., 5th ed. 1984) 23
Restatement (Second) of Agency (1958) 14, 15, 16, 17, 26, 27, 28

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INTEREST OF THE UNITED STATES AND THE EQUAL EMPLOYMENT OPPORTUNITY COMMISSION

Title VII of the Civil Rights Act of 1964, 42 U.S.C. 2000e *et seq.*, prohibits sexual harassment in the workplace on the basis of sex. The Attorney General is responsible for enforcing Title VII with respect to public employers. 42 U.S.C. 2000e-5(f)(1). The United States, in its capacity as employer, has a strong interest in ensuring the fair and balanced enforcement of Title VII. The Equal Employment Opportunity Commission (EEOC) has authority to enforce Title VII with respect to private employers. The EEOC participated as amicus curiae in this case in the en banc proceeding in the court of appeals.

STATEMENT

1. Petitioner Beth Ann Faragher was employed by respondent City of Boca Raton, Florida, as an ocean lifeguard. Pet. App. 70a. Petitioner worked in that capacity on an intermittent basis from September 1985 through June 1990. *Ibid.* Respondent hired its first female lifeguard in 1977, and during the time that respondent was a lifeguard, only four to six of respondent's 40 to 50 lifeguards were women. *Id.* at 72a. All lifeguards shared the same locker room and showers. *Ibid.*

Petitioner's immediate supervisor was David Silverman. Pet. App. 71a. As marine safety lieutenant and later as captain, Silverman supervised the lifeguards' daily duties, designated their work and shift assignments, and supervised their physical fitness routines. *Id.* at 92a. As a lieutenant and later as a training captain, Robert Gordon had similar responsibilities. *Ibid.* Silverman and Gordon reported to Bill Terry, chief of the marine safety section. *Id.* at 71a. Terry interviewed and hired all lifeguards, subject to review at higher levels. *Id.* at 92a. He was also authorized to supervise all aspects of lifeguards' work and to give oral and written reprimands. *Ibid.* Terry reported to the Recreation Superintendent, who worked at respondent's City Hall. *Id.* at 71a-72a. Lifeguards were located far from City Hall and had almost no contact with anyone higher than Terry in the chain of command. *Id.* at 3a, 93a.

Terry sexually harassed petitioner. In particular, Terry would put his arm around petitioner and rest his hand on her buttocks. Pet. App. 74a. While it is unclear the extent to which petitioner was aware of it, Terry engaged in offensive conduct towards other

female lifeguards as well: He referred to women as "cunts" and "bitches" (*id.* at 74a-75a); he touched female lifeguards on the thigh, breast, hip, and buttocks without their consent (*ibid.*); he pressed himself against one lifeguard's buttocks while she was at a water fountain and moved his hips against her in a sexual manner (*id.* at 74a); and he asked one woman on her first interview if she was going to "fuck" or "screw" all of the male lifeguards like the rest of the female lifeguards (*id.* at 75a).

Silverman also sexually harassed petitioner. He performed a pantomime in front of petitioner and another female lifeguard in which he flicked his tongue to depict cunnilingus. Pet. App. 76a. He also tackled petitioner and told her, "If you had tits I would do you in a minute." *Ibid.* Again, while it is unclear the extent to which petitioner was aware of it, Silverman also engaged in sexually offensive conduct towards other female lifeguards: He commented on one female lifeguard's breasts (*id.* at 78a); he told another that he could see her nipples under her bathing suit because it was cold (*id.* at 77a-78a); he told that same lifeguard that he would like to "eat between her legs" (*id.* at 78a); he told another lifeguard on her first day on the job that "I want to lick your clit" (*id.* at 79a); and, on another occasion, he reprimanded that same lifeguard by yelling, "What the fuck are you doing, you cunt" (*ibid.*).

Although respondent had a written policy against sexual harassment, neither Terry nor Silverman was aware of the policy, and there was "a complete failure" to disseminate that policy to marine safety section employees. Pet. App. 83a. Petitioner complained to Gordon about Terry and Silverman. *Id.* at 82a. Most of the other female lifeguards also com-

plained to Gordon about Silverman's conduct. *Ibid.* The female lifeguards spoke to Gordon because they held him in high esteem, not because he was their superior. *Ibid.* Gordon did not report the complaints to any of respondent's management officials. *Ibid.* Gordon told one lifeguard that respondent just didn't care. *Ibid.*

In April 1990, one former female lifeguard wrote a letter to respondent's director of personnel complaining about Terry's and Silverman's sexual harassment. Pet. App. 80a-81a. That former lifeguard had been reluctant to complain prior to becoming tenured in a new job. *Id.* at 83a. After an investigation, respondent determined that Terry and Silverman had engaged in sexual harassment of female lifeguards and reprimanded and disciplined both men. *Id.* at 80a. Terry forfeited 160 hours of annual leave; Silverman forfeited 40 hours of annual leave. *Ibid.* In June 1990, petitioner resigned from her job as a lifeguard to attend law school. *Id.* at 72a-73a.

2. In 1992, petitioner filed suit against respondent in the United States District Court for the Southern District of Florida. She alleged that respondent had subjected her to a hostile work environment on the basis of her sex in violation of Title VII of the Civil Rights Act of 1964, 42 U.S.C. 2000e *et seq.* Pet. App. 69a-70a.[1]

After a non-jury trial, the district court found in favor of petitioner. Pet. App. 69a-104a. It found that Terry's and Silverman's conduct was sufficiently severe and pervasive to alter the conditions of petitioner's employment and create an abusive work environment. *Id.* at 90a. The court further determined that respondent was liable for that hostile work environment, on three grounds. *Id.* at 90a-95a. First, it found that the severity and pervasiveness of the conduct of Terry and Silverman supported an inference that respondent should have known about the harassment and taken steps to address it. *Id.* at 92a, 94a. Second, it found that Terry and Silverman acted as agents for respondent and that respondent was liable on that basis, without regard to whether it knew or should have known about the harassment. *Id.* at 93a. Finally, the district court found that Gordon's knowledge of the harassment provided a further ground for imposing liability on respondent. *Ibid.*

The district court awarded petitioner $1.00 in nominal damages on her Title VII claim. Pet. App. 95a. The court did not award compensatory relief because the events took place prior to the enactment of the amendment to Title VII providing for such relief. *Ibid.* The court did not award injunctive relief because petitioner was no longer employed by respondent. *Ibid.*

3. A panel of the Eleventh Circuit reversed the district court's judgment for petitioner on her Title VII claim. Pet. App. 41a-68a. The court did not disturb the district court's finding that petitioner had been subjected to a hostile work environment. *Id.* at 52a-55a. The court concluded that, while the district court arguably relied on some conduct of which petitioner had been unaware, petitioner's testimony was sufficient by itself to support the district court's finding that petitioner had been subjected to a hostile work environment. *Id.* at 53a-54a.

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[1] Petitioner and another former lifeguard also sued Terry and Silverman. Pet. App. 69a. Those claims are not at issue here and therefore will not be discussed further.

The court went on to hold, however, that respondent was not liable for the hostile work environment that petitioner had experienced. It determined that Silverman and Terry had not acted within the scope of their employment, Pet. App. 59a, that they had not been aided in their harassment by the existence of the agency relationship with respondent, *id.* at 64a n.14, and that respondent had neither actual nor constructive knowledge of the harassment, *id.* at 65a-67a.

4. The Eleventh Circuit granted rehearing en banc to address the scope of an employer's liability for a supervisor's creation of a hostile work environment. Pet. App. 5a. By a 7-5 vote, the en banc court, like the panel, reversed the district court's Title VII judgment in favor of petitioner. *Id.* at 1a-40a. The majority first held that respondent could not be held vicariously liable for Terry's and Silverman's sexual harassment. It determined that Silverman and Terry had acted outside the scope of their employment because, in harassing petitioner, they had been "seeking to further personal ends" and not seeking "to perform any service for [respondent]." *Id.* at 12a. The majority also determined that Silverman and Terry had not been aided in accomplishing the harassment by the existence of an agency relationship with respondent because "[n]o person threatened to fire or demote [petitioner] for refusing to accommodate Terry's and Silverman's harassing overtures," and no employment decisions had been made "based upon [petitioner's] response to their sexual overtures." *Id.* at 13a.

The majority further held that respondent could not be held directly liable for the harassment suffered by petitioner, because respondent had neither actual nor constructive knowledge of the harassment. Pet.

App. 14a-18a. The majority concluded that Gordon's knowledge of the harassment could not be imputed to respondent both because Gordon "did not rank as higher management" and because Gordon had not learned about the harassment as petitioner's supervisor, but "as a friend held in high repute by his colleagues." *Id.* at 15a & n.9. The court also concluded that, while the level of harassment had been sufficiently pervasive to alter petitioner's work conditions, it had not been so pervasive that respondent should have known about it. *Id.* at 15a-17a. In the majority's view, the district court had erred by equating those two inquiries. *Id.* at 16a. Finally, the majority concluded that constructive knowledge could not be imputed to respondent based on respondent's failure to disseminate its policy against sexual harassment. *Id.* at 17a n.11. The court stated that "[t]he district court did not find that [respondent] would have known about the harassment if it had effectively disseminated this policy," and "the record indicates that failure to disseminate this policy was not the reason why [respondent] did not know about the harassment." *Ibid.*

Judge Barkett (joined by Judges Hatchett and Kravitch) filed an opinion dissenting in relevant part. Pet. App. 18a-31a. She concluded that the district court did not clearly err in finding that the pervasiveness of the harassment supported an inference that respondent had constructive notice of it. *Id.* at 20a-23a. Judge Barkett also concluded that respondent was vicariously liable for the harassment, both because Terry and Silverman had acted within the scope of their employment when they harassed petitioner and because they had been aided in their harassment of petitioner by their agency relationship with re-

spondent. Judge Barkett reasoned that the harassment was within the scope of Terry's and Silverman's employment because it had occurred while they were exercising their authority to direct petitioner in the performance of her duties. *Id.* at 28a-29a. Judge Barkett concluded that Terry and Silverman had been aided in harassing petitioner by their agency relationship with respondent because Terry and Silverman "were granted virtually unchecked authority over the work environment," *id.* at 30a, and because respondent's policy on sexual harassment "was never disseminated among Marine Safety Section employees," leaving employees without any "effective avenue of redress," *id.* at 31a.

Judge Tjoflat filed a separate opinion dissenting in relevant part. Pet. App. 32a-38a. Judge Tjoflat concluded that, because "Terry was in charge of the workplace" and "he was aware that [petitioner] was working in a sexually abusive environment and did nothing to correct the situation," respondent should be liable "for the injury she sustained." *Id.* at 35a-36a. Judge Tjoflat also concluded that, by failing to communicate its policy to its employees or to identify the person to whom complaints of sexual harassment should be made, respondent had "effectively concealed from those employees the avenue for redress of grievances." *Id.* at 36a. Exonerating an employer in such circumstances, Judge Tjoflat concluded, "dilutes the employer's duty under Title VII to maintain a workplace free of severe and pervasive sexual harassment," "places an undue burden on employees who wish to complain of harassment in the workplace," and "has the potential to breed disrespect for the law." *Ibid.*

Judge Anderson also filed an opinion dissenting in relevant part. Pet. App. 38a-40a. Judge Anderson concluded that Gordon's statement that respondent did not care about sexual harassment supported the district court's finding of constructive notice. *Id.* at 39a. Judge Anderson also concluded that respondent should be liable under agency principles, because respondent had "left Terry wholly unsupervised with respect to Terry's management of the workplace," "gave Terry no effective instructions with respect to its sexual harassment policy," and "did not disseminate its policy against sexual harassment to [petitioner] or similarly situated employees." *Id.* at 39a-40a.

SUMMARY OF ARGUMENT

A. In *Meritor Savings Bank, FSB* v. *Vinson*, 477 U.S. 57 (1986), the Court held that common law agency principles should guide courts in deciding when an employer is liable for a supervisor's sexual harassment of a subordinate. Under common law agency principles, if a supervisor is aided by his agency relationship with the employer in creating a hostile work environment, the employer is liable without more. If the supervisor is not aided by the agency relationship, and instead simply takes advantage of his proximity to an employee in the same way that a co-worker could, the employer is liable if it knew or should have known about the harassment and failed to take appropriate corrective action.

B. Although the court of appeals recognized that an employer is liable for a supervisor's creation of a hostile work environment when the supervisor is aided by his agency relationship in creating it, the court concluded that a supervisor is "aided" in the

relevant sense only when the supervisor threatens or imposes adverse employment conditions. Even when a supervisor refrains from explicitly threatening adverse employment consequences, however, a subordinate is bound to be aware that the supervisor has that power. A supervisor bent on exploiting his authority therefore may not need to make explicit threats; he may be able to rely on implicit understandings. And that is particularly true when the employer has given the supervisor an extensive delegation of authority or when there is no effective policy against sexual harassment. Thus, even when there are not explicit threats, a plaintiff should be able to demonstrate that the supervisor has been aided by his agency relationship if she shows that (1) she feared adverse employment consequences if she resisted or complained, and (2) her fear was objectively reasonable in light of the employer's practices and the supervisor's conduct.

Under that standard, the district court's subsidiary findings could support a finding that respondent's supervisors were aided by their agency relationship in harassing petitioner. In essence, the district court found that respondent gave Terry and Silverman virtually unchecked authority over petitioner in a remote location, and failed to provide petitioner with an effective avenue for seeking protection against sexual harassment. Those facts could support a finding that petitioner reasonably feared adverse employment consequences if she resisted or complained. Because that inquiry is a factual one that has not yet been addressed by the district court, the question whether Terry and Silverman were aided by their agency status in harassing petitioner should be remanded to the district court.

C. Respondent also might be liable by virtue of supervisor Gordon's knowledge about the harassment. The court of appeals refused to attribute Gordon's knowledge to respondent because Gordon was not a member of high-level management and because he learned about the harassment in his capacity as a friend. Under agency principles, however, the knowledge of an agent is attributed to an employer as long as the agent has a duty to disclose the information to the employer and the agent did not receive the information in confidence. The case therefore should be remanded for findings on (a) whether Gordon had a duty to report acts of harassment to officials who had the authority to stop it and (b) whether Gordon learned about the harassment through confidential disclosures.

D. Finally, respondent also might be liable on a "should have known" theory, because it failed to disseminate its policy against harassment, potentially leaving petitioner and other lifeguards without an effective avenue of complaint, and leaving supervisor Gordon with the belief that respondent did not care about harassment. The court of appeals erred in rejecting that theory of liability based on the district court's failure to find that respondent would have learned about the harassment if it had effectively disseminated the policy, and on the court of appeals' view that the record indicates that respondent would not have learned about it. When a district court has failed to make a finding on a dispositive factual issue, an appellate court ordinarily should remand the issue for that determination, rather than decide the issue for itself based on its view of what the record indicates. The court of appeals' judgment in this case should

therefore be reversed and the case remanded for further proceedings.

ARGUMENT

THE COURT OF APPEALS APPLIED THE WRONG LEGAL STANDARDS IN DECIDING THAT RESPONDENT WAS NOT LIABLE FOR THE HOSTILE WORK ENVIRONMENT CREATED BY ITS SUPERVISORS

A. An Employer Is Liable For A Supervisor's Harassment Of A Subordinate When The Supervisor Is Aided In The Harassment By His Agency Relationship Or When The Employer Knew Or Should Have Known About The Harassment And Failed To Take Appropriate Corrective Action

1. Title VII of the Civil Rights Act of 1964 provides, in relevant part, that "[i]t shall be an unlawful employment practice for an employer"

> to fail or refuse to hire or to discharge any individual, or otherwise to discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment, because of such individual's race, color, religion, sex, or national origin.

42 U.S.C. 2000e-2(a)(1). In *Meritor Savings Bank, FSB* v. *Vinson*, 477 U.S. 57 (1986), the Court held that employment discrimination that takes the form of sexual harassment violates Title VII. The Court explained that, "[w]ithout question, when a supervisor sexually harasses a subordinate because of the subordinate's sex, that supervisor 'discriminate[s]' on the basis of sex." *Id.* at 64. The Court further held that Title VII's protection against sexual harassment encompasses more than a prohibition against "quid pro quo" harassment, where submission to sexual demands is made a condition of a tangible job benefit, such as a promotion or a raise. *Ibid.*; see 29 C.F.R. 1604.11(a)(2) (defining quid pro quo harassment). Title VII also provides protection against sexual harassment that takes the form of a hostile work environment, *i.e.*, harassment that is "sufficiently severe or pervasive 'to alter the conditions of [the victim's] employment and create an abusive working environment.'" *Meritor*, 477 U.S. at 67.

In *Meritor*, the Court also addressed the question of when an employer is liable for a supervisor's sexual harassment of a subordinate. The court of appeals in that case had held that employers are always automatically liable for sexual harassment by their supervisors. 477 U.S. at 72. The employer argued that a policy against discrimination with a grievance procedure, coupled with an employee's failure to invoke that procedure, should insulate an employer from liability. *Ibid.* The Court rejected both of those per se rules. *Ibid.* The correct approach, the Court held, is informed by the text of Title VII. By defining "employer" to include any "agent," Congress indicated that it "wanted courts to look to agency principles for guidance." *Ibid.* The Court cautioned, however, that "common-law principles may not be transferable in all their particulars to Title VII." *Ibid.* *Meritor* therefore contemplates that, in deciding whether an employer is liable for sexual harassment in the workplace, a court should apply common law agency principles as long as they are compatible with the purposes of Title VII.[2]

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[2] Because the question of employer liability for a supervisor's harassment of a subordinate depends on an interpretation

2. The Restatement (Second) of Agency (1958) sets forth several rules concerning when an employer is liable for the torts of his servants. It states that "[a] master is subject to liability for the torts of his servants committed while acting in the scope of their employment." *Id.* § 219(1), at 481. When the servant acts outside the scope of employment, the master is not liable unless (a) "the master intended the conduct or the consequences," (b) "the master was negligent or reckless," (c) "the conduct violated a non-delegable duty of the master," or (d) "the servant purported to act or to speak on behalf of the principal and there was reliance upon apparent authority, or he was aided in accomplishing the tort by the existence of the agency relation." *Id.* § 219(2), at 481.

a. The application of those common law agency principles has not proven difficult in cases involving quid pro quo harassment. The courts of appeals have generally agreed that an employer is liable when a supervisor engages in quid pro quo harassment. *Jansen* v. *Packaging Corp. of Am.*, 123 F.3d 490, 495 (7th Cir. 1997) (en banc), petition for cert. pending, No. 97-569; *Davis* v. *City of Sioux City*, 115 F.3d 1365,

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of the term "agent" in Title VII, it is a question of federal law; it does not depend on the vagaries of state agency law. See *Community for Creative Non-Violence* v. *Reid*, 490 U.S. 730, 740-741 (1989) ("[W]hen we have concluded that Congress intended terms such as 'employee,' 'employer,' and 'scope of employment' to be understood in light of agency law, we have relied on the general common law of agency, rather than on the law of any particular State, to give meaning to these terms."). To defer to state law definitions "could introduce striking geographical disuniformities." *Jansen* v. *Packaging Corp. of Am.*, 123 F.3d 490, 506-507 (7th Cir. 1997) (Posner, C.J., concurring and dissenting), petition for cert. pending, No. 97-569.

1367 (8th Cir. 1997); *Nichols* v. *Frank*, 42 F.3d 503, 513-514 (9th Cir. 1994); *Bouton* v. *BMW of N. Am., Inc.*, 29 F.3d 103, 106-107 (3d Cir. 1994); *Karibian* v. *Columbia Univ.*, 14 F.3d 773, 777 (2d Cir.), cert. denied, 512 U.S. 1213 (1994); *Sauers* v. *Salt Lake County*, 1 F.3d 1122, 1127 (10th Cir. 1993); *Kauffman* v. *Allied Signal, Inc.*, 970 F.2d 178, 185-186 (6th Cir.), cert. denied, 506 U.S. 1041 (1992); *Steele* v. *Offshore Shipbuilding, Inc.*, 867 F.2d 1311, 1316 (11th Cir. 1989).

For example, if a supervisor fires an employee because she refuses to submit to an advance, the employer is liable, without regard to whether the employer knew or should have known about the harassment, and without regard to whether the employer had a policy prohibiting such conduct. Because the harasser is able to fire the employee only because the employer has delegated to him the authority to do so, the supervisor is necessarily "aided in accomplishing the tort by the existence of the agency relation." Restatement, *supra*, § 219(2)(d). And since that ground for imposing liability depends on the agent's abuse of delegated powers and not on the employer's own "inten[t]" or "negligence" (§ 219(2)(a) and (b)), neither the employer's lack of knowledge about the harassment nor the employer's failure to authorize such conduct can relieve the employer of liability.

That principle is not unique to discrimination that takes the form of sexual harassment. It has long been established that, when a supervisor refuses to hire or discharges an employee on the basis of race or sex, that act is attributed to the employer, regardless of that employer's policies. *Long* v. *Eastfield College*, 88 F.3d 300, 306-307 (5th Cir. 1996); *Shager* v. *Upjohn Co.*, 913 F.2d 398, 405 (7th Cir. 1990); *Flowers* v.

Crouch-Walker Corp., 552 F.2d 1277, 1282 (7th Cir. 1977); *Anderson* v. *Methodist Evangelical Hosp., Inc.*, 464 F.2d 723, 725 (6th Cir. 1972). There is no basis for applying a different rule to discrimination that takes the form of sexual harassment.

b. The courts of appeals have also agreed on the appropriate standard of employer liability for co-worker harassment. In that context, employers are liable when the employer knew or should have known about the harassment and failed to take appropriate corrective action. See, *e.g.*, *Blankenship* v. *Parke Care Centers, Inc.*, 123 F.3d 868, 872 (6th Cir. 1997), petition for cert. pending, No. 97-906; *McKenzie* v. *Illinois Dep't of Transp.*, 92 F.3d 473, 480 (7th Cir. 1996); *Karibian*, 14 F.3d at 780; see also 29 C.F.R. 1604.11(d) (in cases involving "fellow employees," the employer is responsible for acts of sexual harassment when it "knows or should have known of the conduct, unless it can show that it took immediate and appropriate corrective action"). Because co-workers have not been delegated authority to act on behalf on the employer vis-a-vis their fellow employees, sexual harassment by such co-workers cannot be aided by an agency relationship with the employer. Liability therefore depends on whether the employer itself is "negligent or reckless," see Restatement, *supra*, § 219(2)(b), and negligence or recklessness is shown when the employer knew or should have known about the harassment and failed to take appropriate corrective action.

c. Those areas of agreement point the way to the correct approach for deciding when an employer is liable for a hostile work environment created by a supervisor. If the supervisor is aided by the agency relationship in creating the hostile work environment, the employer is liable without more. If the supervisor is not aided by the agency relationship, and instead simply takes advantage of his proximity to an employee in the same way that a co-worker could, liability would depend on whether the employer knew or should have known about the harassment and failed to take appropriate corrective action. See *Torres* v. *Pisano*, 116 F.3d 625, 633-634 (2d Cir. 1997), cert. denied, No. 97-578 (Dec. 1, 1997); *Harrison* v. *Eddy Potash, Inc.*, 112 F.3d 1437, 1445-1446 (10th Cir. 1997), petition for cert. pending, No. 97-232; *Karibian*, 14 F.3d at 780.[3]

The court of appeals in this case purported to follow those general agency principles. Pet. App. 7a-8a. As we explain below, however, it adopted the wrong legal standards for deciding those issues.

B. The Court Of Appeals Applied The Wrong Legal Standard In Finding That The Harassment Of Petitioner Was Not Aided By An Agency Relationship With Respondent

1. The court of appeals in this case recognized (Pet. App. 10a) that, under common law agency principles, an employer is liable for a supervisor's creation of a hostile work environment when the supervisor is aided by his agency relationship in creating that environment. The court apparently concluded, however, that a supervisor is "aided" in the relevant sense only when the supervisor actually

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[3] When sexual harassment is intended solely to further private aims, rather than a purpose of the employer, it is outside the scope of employment. Restatement, *supra*, § 228(1), at 504. In circumstances in which the harassment is intended in part to further a purpose of the employer, the employer could be liable on a scope-of-employment theory as well.

threatens or imposes adverse employment consequences. *Id.* at 13a. Finding no evidence that Terry or Silverman threatened or imposed adverse employment consequences on petitioner, the court concluded that their harassment of petitioner was not aided by their agency relationship with respondent. *Id.* at 12a-14a. Agency principles are not so restrictive.

The threat or imposition of adverse employment consequences is one way in which a supervisor may abuse his delegated authority in harassing a subordinate. See *Martin* v. *Cavalier Hotel Corp.*, 48 F.3d 1343, 1352-1353 (4th Cir. 1995) (supervisor allegedly told subordinate that if she failed to submit to him she would lose her job); *Karibian*, 14 F.3d at 776 (supervisor told subordinate that she "owed him" for all that he had done for her as a supervisor, and varied her raises, hours, autonomy, and flexibility according to her responsiveness to his sexual demands); *Sparks* v. *Pilot Freight Carriers, Inc.*, 830 F.2d 1554, 1560 (11th Cir. 1987) (supervisor repeatedly reminded his subordinate that he could fire her if she refused his advances). As cases in the courts of appeals illustrate, however, the threat or imposition of adverse employment consequences is not the only way in which a supervisor may abuse his supervisory authority.

For example, in *Harrison*, an underground foreman repeatedly ordered one of his subordinates to accompany him to isolated areas in a mine, where he would then sexually abuse her. 112 F.3d at 1440-1441. Because the employer's delegation of authority to the supervisor to control his subordinates' work assignments aided in the accomplishment of the harassment, the employer was potentially subject to liability, without regard to whether the employer knew or should have known about the sexual abuse. *Id.* at

1445-1446, 1451. Similarly, in *Tomka* v. *Seiler Corp.*, 66 F.3d 1295, 1306-1307 (2d Cir. 1995), a plaintiff alleged that, while they were traveling on business, her supervisor required her to attend a dinner that he described as a business meeting, pressured her to conform to corporate culture by drinking, and then sexually abused her. Because, under plaintiff's allegations, the supervisor had used his supervisory authority to create the circumstances that made the abuse possible, the employer was potentially subject to liability. *Ibid.* Those cases provide concrete examples of why the court of appeals in this case erred in making the threat or imposition of adverse employment consequences a prerequisite to finding that a supervisor has been aided by his agency relation in harassing a subordinate.

More generally, the court of appeals' threat requirement ignores the workplace reality that "a supervisor, by virtue of his position in a hierarchy, always possesses a degree of leverage over a supervisee." *Jansen*, 123 F.3d at 497 n.4 (Flaum, J., concurring). Even when a supervisor refrains from reminding a subordinate that he has the authority to impose adverse employment consequences, an employee is bound to be aware of that fact. *Id.* at 512 (Posner, C.J., concurring and dissenting). The employee may also have reason to believe that the supervisor is more highly valued by the employer, and that, as a consequence, any complaint she files with the employer may endanger her employment status rather than his. *Ibid.* Given that workplace reality, in some instances, a supervisor bent on exploiting his authority over his subordinates may have no need to utter concrete threats about adverse employment consequences. That may be particularly true when there is an exten-

sive delegation of authority or when an employer does not have an effective policy against sexual harassment. As the EEOC has stated in its Policy Guidance on Current Issues of Sexual Harassment, "[a] supervisor's capacity to create a hostile environment is enhanced by the degree of authority conferred on him by the employer." EEOC Compl. Man. (CCH) ¶ 3114, at 3280 (Mar. 19, 1990) (EEOC Policy Guidance). And, depending on the circumstances, "in the absence of a strong, widely disseminated, and consistently enforced employer policy against sexual harassment, and an effective complaint procedure, employees could reasonably believe that a harassing supervisor's actions will be ignored, tolerated, or even condoned by upper management." *Ibid.*[4]

Those considerations suggest that the inquiry into whether a supervisor has been aided by his agency status should not focus solely on whether the supervisor has threatened or imposed adverse employment consequences, or on whether a supervisor has used his supervisory authority to direct an employee to a place where she is in a vulnerable position. When those facts are not present, a court should also inquire into whether, in light of the employer's practices and the supervisor's conduct, an employee would reasonably fear that adverse employment consequences will result if she resists or complains. When the employer's practices and the supervisor's conduct reasonably have led an employee to fear that adverse employment consequences will result if she resists or complains, a supervisor has been sufficiently "aided" by his agency status to subject the employer to liability under common law principles of agency.

The inquiry we propose is necessarily fact-intensive, and a wide variety of circumstances may be relevant, including the extent of the delegation of authority, the effectiveness of any employer policy against harassment, whether the harassment occurred during the course of supervision, and the past actions of the supervisor. Ultimately, when a supervisor has not threatened or imposed adverse employment consequences, and has not used his supervisory authority to direct an employee to a place where she is in a vulnerable position, the plaintiff must establish two elements to impose liability on the employer: First, that she feared adverse employment consequences if she resisted or complained; and, second, that her fear was objectively reasonable in light of the supervisor's conduct and the employer's practices. The findings on those two elements should be made by the district court, subject to review for clear error, or by a jury, subject to review for sufficiency of the evidence.

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[4] The EEOC has provided guidance on the elements of an effective policy against sexual harassment:

> An effective preventive program should include an explicit policy against sexual harassment that is clearly and regularly communicated to employees and effectively implemented. The employer should affirmatively raise the subject with all supervisory and non-supervisory employees, express strong disapproval, and explain the sanctions for harassment. The employer should also have a procedure for resolving sexual harassment complaints. The procedure should be designed to "encourage victims of harassment to come forward" and should not require a victim to complain first to the offending supervisor. It should ensure confidentiality as much as possible and provide effective remedies, including protection of victims and witnesses against retaliation.

EEOC Policy Guidance, *supra*, ¶ 3114, at 3282 (citation omitted).

2. Application of that approach is consistent with the purposes of Title VII. One major purpose of Title VII is to provide a "spur" or a "catalyst" for an employer to eliminate discrimination from its workplace. *Albemarle Paper Co.* v. *Moody*, 422 U.S. 405, 417-418 (1975). Holding an employer liable when a supervisor is aided in the harassment of a subordinate by the employer's delegation of authority in the sense we have described provides just such a catalyst. When an employer knows that it will be liable if that authority is misused, the employer has a strong incentive to formulate the kind of hiring practices, training methods, review processes, complaint procedures, and disciplinary measures that are best calculated to prevent sexual harassment from occurring or recurring. Indeed, one of the principal stated justifications for the common law rule imposing liability on employers for the acts of their agents without regard to employer fault is that it induces employers to intensify their efforts to prevent their agents from causing harm. James, *Vicarious Liability*, 28 Tul. L. Rev. 161, 168 (1954). That justification is particularly persuasive here, in light of the statutory purpose just described.

A second major purpose of Title VII is to compensate the victims of discrimination. *Albemarle*, 422 U.S. at 418. With the enactment of the Civil Rights Act of 1991, which authorizes compensatory damages for intentional violations of the Act, 42 U.S.C. 1981a(b), that purpose has assumed increased significance in cases of sexual harassment. The 1991 Act evidences Congress's view that the victims of sexual harassment should be compensated "for the terrible injury to their careers, to their mental, physical, and emotional health, to their self-respect and dignity,

and for other consequential harms." 137 Cong. Rec. 30,661 (1991) (section-by-section analysis of Rep. Edwards). Recognition of an employer's liability for harassment that has been aided by the agency relationship in the sense we have described is consistent with that goal as well. One of the reasons the common law holds employers liable for the wrongdoing of agents who abuse their authority is to ensure that the victims of wrongful conduct do not go uncompensated. James, 28 Tul. L. Rev. at 169-170; *Prosser and Keeton on the Law of Torts* 500-501 (W. Page Keeton ed., 5th ed. 1984). The common law approach rests on the view that, because the employer has sought to profit through the use of agents, the employer, rather than the innocent victim, should bear the costs when those agents abuse their delegated authority and cause injury. *Ibid.* That common law rationale is fully applicable here.

3. Under the correct approach to employer liability, the district court's subsidiary findings could support a finding that Terry's and Silverman's harassment of petitioner was aided by their agency relationship with respondent. The district court found that respondent gave Terry and Silverman broad authority over petitioner's terms and conditions of employment. Pet. App. 92a-93a. Terry was authorized to supervise all aspects of petitioner's work and to give her oral and written reprimands, and Silverman supervised petitioner's daily duties and designated work and shift assignments. *Id.* at 92a. Terry's and Silverman's authority over petitioner was further enhanced by the remote location, where lifeguards had almost no contact with anyone higher than Terry in the chain of command. *Id.* at 3a, 93a. The district court also found that respondent did not have an effective policy

against harassment. *Id.* at 83a. While respondent had a written policy against sexual harassment, Terry and Silverman were not even aware that it existed, and there was "a complete failure" to disseminate the policy to marine safety section employees. *Ibid.*

In essence, then, the district court found that respondent gave Terry and Silverman virtually unchecked authority over petitioner in a remote location, and failed to provide an effective avenue for seeking redress against sexual harassment. Pet. App. 82a-84a. Given the inherent leverage that Terry and Silverman possessed over petitioner, those facts could support a finding that petitioner reasonably feared that there would be adverse employment consequences if she resisted or complained.

We do not, however, urge the Court to affirm the district court's finding of liability against respondent on that basis. As we have stated, the inquiry into whether a subordinate reasonably feared adverse employment consequences if she resisted or complained is ultimately a factual one. And while the district court found that Terry's and Silverman's harassment of petitioner was aided by their agency status, it did not resolve that issue in accordance with the legal standard we have proposed. See Pet. App. 92a-93a. That issue should therefore be remanded to the district court for a determination under the correct legal standard.

C. The Court Of Appeals Applied The Wrong Legal Standard For Determining When A Supervisor's Knowledge Of Harassment Can Be Imputed To An Employer

As previously discussed, even if a supervisor's harassment of a subordinate is not aided by an agency relationship, an employer is still liable if the employer knew or should have known about the harassment and failed to take appropriate corrective action. See also *Bouton*, 29 F.3d at 106; *Davis*, 115 F.3d at 1367-1368; *Nichols*, 42 F.3d at 508. The district court found that one of respondent's supervisors, Robert Gordon, actually knew about the harassment of petitioner, and that Gordon's knowledge could be imputed to respondent. Pet. App. 93a. The court of appeals held, however, that Gordon's knowledge could not be imputed to respondent because, in its view, only the knowledge of high-level management may be imputed to an employer and Gordon was not a member of high-level management. *Id.* at 15a. The court of appeals also refused to impute Gordon's knowledge to respondent because Gordon had learned about the harassment in his capacity as a friend rather than in his capacity as a supervisor. *Id.* at 15a n.9. The court of appeals too narrowly defined the circumstances in which the knowledge of a supervisor may be imputed to an employer.

The determination of when an agent's knowledge of harassment may be imputed to an employer should be guided by general principles of agency law. *Meritor*, 477 U.S. at 72. Under general agency principles, the knowledge imputed to an employer is not limited to what is known by high-level management. Instead, the knowledge of an employer's agent is imputed to the employer whenever the agent has a duty to report

the information to the employer. See Restatement, *supra*, § 272, at 591 ("[T]he liability of a principal is affected by the knowledge of an agent concerning a matter as to which * * * it is his duty to give the principal information."); *id.* § 275, at 598 ("[T]he principal is affected by the knowledge which an agent has a duty to disclose to the principal or to another agent of the principal to the same extent as if the principal had the information.").

Consistent with that general principle, an agent's knowledge of sexual harassment may be imputed to the employer when the agent's job duties require that he stop the harassment or pass on the information about the harassment to someone who can. *Young* v. *Bayer Corp.*, 123 F.3d 672, 674-675 (7th Cir. 1997). Knowledge may also be imputed when one of those two duties exists by virtue of "general norms of management" (*ibid.*)—including the agent's responsibilities to the employer with respect to other violations of applicable legal requirements occurring on the job. Thus, when the person with knowledge is the harasser's supervisor, knowledge will be imputed to the employer. General norms of management would require the supervisor to halt such harassment. See *Torres*, 116 F.3d at 637 & n.16. When the person with knowledge supervises the *harassee*, but not the harasser, knowledge may be imputed when the "supervisor was empowered (that is, charged with a duty) to protect the harassee from further harm." *Id.* at 637 n.16. The court of appeals therefore erred in holding that, as a matter of law, Gordon's knowledge could not

be imputed to respondent because Gordon was not a member of high-level management.[5]

Nor is it controlling that Gordon acquired the information in his capacity as a friend rather than as a supervisor. Under general agency principles, "[e]xcept for knowledge acquired confidentially, the time, place, or manner in which knowledge is acquired by a servant or other agent is immaterial in determining the liability of his principal because of it." Restatement, *supra*, § 276, at 602. The relevant inquiry is therefore not whether Gordon received the information as a friend or as a supervisor, but whether he received it in confidence.

Thus, Gordon's knowledge should be imputed to respondent if (1) Gordon had a duty to disclose his knowledge about Terry's and Silverman's sexual harassment to an official who could stop it, and (2) Gordon did not receive the information in confidence. Because neither the district court nor the court of appeals addressed those issues, the question whether Gordon's knowledge of the harassment may be imputed to respondent should be remanded for further proceedings.

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[5] Under general agency principles, an agent's knowledge that he has personally engaged in wrongdoing may not be imputed to the employer. Restatement, *supra*, § 280, at 609. Thus, Terry's and Silverman's knowledge of their own wrongdoing may not be imputed to respondent. When a proprietor, partner, or corporate officer personally participates in the harassment, that conduct would be attributed to the employer. *Andrade* v. *Mayfair Management, Inc.*, 88 F.3d 258, 261 (4th Cir. 1996).

D. The Court Of Appeals Erred In Failing To Remand To The District Court The Question Whether Respondent's Failure To Disseminate Its Policy Against Harassment Warranted A Finding That Respondent Should Have Known About The Harassment Of Petitioner

In deciding whether an employer should have known about harassment, one relevant inquiry is whether the employer exercised reasonable care to ensure that it would learn about harassment if it occurred. Restatement, *supra*, § 219(2)(b) (employer is liable for its own negligence). Respondent failed to take such reasonable steps here. The district court found that there was a complete failure by respondent to distribute its sexual harassment policy, potentially leaving petitioner and other female lifeguards subject to harassment without an effective avenue of complaint, and leaving supervisor Gordon with the belief that respondent simply did not care about sexual harassment. Pet. App. 82a-84a.

In many workplaces, the danger of sexual harassment is sufficiently foreseeable that an employer that fails to develop an effective policy against harassment, including an effective complaint mechanism by which victims can obtain relief without fear of retaliation, risks a finding that it has been negligent. See *Jansen*, 123 F.3d at 510-511 (Posner, C.J., concurring and dissenting). Respondent, in particular, should have been aware of the need for an effective policy. Given the formerly all-male character of the lifeguard staff, the small number of female lifeguards, the nature of lifeguard work, and the sharing of locker rooms and showers, Pet. App. 72a, the potential for sexual harassment should have been apparent. Respondent's failure to implement an effective policy against harassment reflects a basic failure to exercise reasonable care.

The court of appeals discounted the significance of the ineffectiveness of respondent's policy on the ground that the district court did not find that respondent would have known about the harassment even if it had effectively disseminated the policy. Pet. App. 17a n.11. The court also stated that "the record indicates that failure to disseminate th[e] policy was not the reason why [respondent] did not know about the harassment." *Ibid.*

The court of appeals provided no explanation, however, for its conclusion that an effective policy would not have resulted in respondent's learning about the harassment. That failure is particularly glaring because Terry's and Silverman's harassment occurred over a period of years and affected numerous female lifeguards besides petitioner. Pet. App. 73a-79a. A report by one or more of those other lifeguards might well have led to the detection of the harassment of petitioner, and a report by petitioner or Gordon certainly would have given respondent such knowledge. In light of those potential sources of information, the appellate court's unsupported statement that the record indicates that an effective policy would not have made a difference is insufficient and unpersuasive.

More fundamentally, when a district court fails to make a finding on a dispositive factual issue, the appropriate course for an appellate court is to remand to the district court for resolution of that factual issue. *Pullman-Standard* v. *Swint*, 456 U.S. 273, 291-293 (1982). An appellate court should not ordinarily undertake to resolve the issue itself based on its view of what the record "indicates." *Ibid.* Since the record here would be consistent with a contrary

finding, the court of appeals erred in deciding for itself that respondent's failure to disseminate its policy was not the reason that respondent did not know about the harassment, rather than remanding that issue to the district court. The district court should now be permitted to decide that issue in the first instance.

CONCLUSION

The judgment of the court of appeals should be reversed and the case should be remanded for further proceedings.

Respectfully submitted.

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